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(J)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 586

THE CUSHMAN MOTOR WORKS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23-42) is reported at 44 B. T. A. 1288. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 230-237) is reported at 130 F. 2d 977.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 19, 1942 (R. 238). Petition for rehearing was denied November 6, 1942 (R. 255). The petition for a writ of certiorari

was filed December 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a transaction in which property is transferred by the trustees of a dissolved Nebraska corporation to another corporation may constitute a "reorganization" within the definition of Section 112 (g) (1) of the Revenue Act of 1934.

2. If so, whether in the circumstances of this case the taxpayer had acquired properties from such trustees in connection with a reorganization within the meaning of Sections 112 (g) (1) and 113 (a) (7) of the Act with the result that the basis of the assests in the hands of the trustees will carry over.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

Cushman Motor Works was organized in 1913 (R. 25). We shall hereinafter refer to it as "Motor Works" to distinguish it from The Cushman Motor Works, a corporation which was formed later and which is the taxpayer in the instant case.

Motor Works owned and operated a manufacturing plant at Lincoln, Nebraska, where it produced internal combustion engines, power lawn mowers and other machinery. Following a series of prosperous years it began to lose money in 1921. As of October 31, 1932, it had an accumulated deficit of \$352,995.10 (though its capital stock account still showed a value of \$486,204.90). (R. 25-26, 56.)

A partnership consisting of Charles and John Ammon and known as Easy Manufacturing Company operated a neighboring plant. Charles Ammon, acting for the partnership, began buying Motor Works stock in 1930, and by the end of 1932 had acquired a controlling interest. (R. 26.)

Ammon thought that Motor Works could be operated at a profit under the proper conditions. Soon after his original purchases of its stock he discussed with its manager a merger between it and Easy Manufacturing Company. In 1932 he enlarged the proposal to include McGrew Machine Company located nearby and producing sheet metal products. (R. 26.) At this time Motor Works had two classes of stock outstanding, namely 2,938 shares of preferred and 5,454 of common, each share with a par value of \$100 (R. 56).

On December 7, 1932, Ammon mailed a letter to the stockholders of Motor Works proposing a merger of Motor Works, the McGrew Machine

Company, and the Easy Manufacturing Company into one corporation. His plan was to issue stock of a new corporation for the assets of the three plants and to sell additional stock at \$15 per share to acquire needed cash. His proposal to the stockholders of Motor Works was that Motor Works preferred stock might be exchanged for stock of the new corporation share for share, or might be turned in for \$10 cash per share. A third proposal was to allow Motor Works preferred stockholders to receive two shares of stock of the new corporation for one share of Motor Works preferred and \$10 in cash. No suggestion was made whereby the holders of the common stock of Motor Works should receive any interest in the new corporation. (R. 26-27.)

At the annual meeting of the stockholders of Motor Works on January 9, 1933, the minority stockholders raised objection to the plan proposed by Ammon, contending that the assets of the company could be sold at a price or prices that would result in a more substantial realization for the stockholders, and a resolution was adopted instructing Fred D. Stone to negotiate with persons desirous of purchasing "the complete assets and business of the company" and directing him to report the results of such negotiations to the board of directors prior to February 11, 1933. Ammon was named chairman of a committee to make further investigation concerning the possibility of "bring-

ing about a consolidation or merger * * * with some other corporation or corporations." He was directed to report at the adjourned meeting of the stockholders to be held on February 13 following. The opposition to this plan proposed by Ammon centered largely in the officers and directors of the corporation and Ammon caused the election of a new board of directors, all of the directors so elected, except one, being from among his associates. (R. 27.)

At the adjourned meeting of the stockholders on February 13, 1933, it was reported that Stone had been unable to obtain any definite proposition for the purchase of "the complete assets and business of the company" (R. 27).

Meanwhile there was pending against Motor Works an action brought by Ammon for the redemption of 88 shares of preferred stock standing in his name. The articles of incorporation provided that a sinking fund for the retirement of the preferred stock should be created out of the net earnings of the corporation that remained after deducting any accrued dividends. Up to 3 percent of the preferred stock might be retired each year on demand of the holders to the extent that the sinking fund so accumulated would permit. In earlier years Motor Works had accrued such a sinking fund in the amount of \$17,010, and under date of August 1, 1931, Ammon had made written demand on Motor Works to redeem pre-

ferred stock owned by him in accordance with the redemption provisions thereof. Motor Works had refused the request on the ground that it was not legally so obligated and had claimed further that it was not financially able to do so. On September 7, 1932, Ammon had renewed his demand, asking that Motor Works redeem 88 shares, which, according to his information, was 3 percent of the preferred stock of Motor Works outstanding. Motor Works did not comply with his request and he instituted suit. (R. 28.)

On the day Ammon obtained his judgment, a notice of a special meeting was mailed to the shareholders, calling attention to debts and judgments aggregating \$67,000, and stating that immediate action was required. The meeting was called for the purpose of reorganizing and raising at least \$65,000 among the stockholders, or dissolving and liquidating the corporation. (R. 28-29.)

The meeting was held March 6, 1933. A resolution was passed referring to accumulated losses, and lack of funds for working capital and to meet current liabilities. The resolution provided that the corporation should be dissolved, and a report of the dissolution filed with the Secretary of State. The directors were instructed to sell the corporate assets, wind up the corporate affairs, and make distribution to the stockholders. Subsequently, the directors met and resolved to carry

out the liquidation by offering the entire plant, assets and business of Motor Works at public auction. Several auction dates were successively set, but the sale was postponed each time for lack of bidders. During this interval Ammon himself was negotiating with a certain Dempster Mill Manufacturing Company to interest it in purchasing some of the assets. Finally, at the end of July, 1933, efforts to auction the assets of Motor Works were abandoned. (R. 29-31.)

At some date not disclosed Ammon personally purchased from the First National Bank, the principal creditor of Motor Works, notes of that company approximating \$30,000, paying the face amount plus accrued interest. He also purchased from other creditors accounts payable of approximately \$12,000 to \$14,000, paying 75 cents on the dollar. He agreed with the creditors from whom the accounts payable were purchased that if the assets and business of Motor Works should be liquidated they should receive an additional 25 cents on each dollar of such accounts, but if the business should continue as a going concern and should remain a customer of such creditors, nothing further was to be paid to them. (R. 31-32.)

Ammon's judgment on his preferred stock claim was set aside May 16, 1933, at the instance of minority shareholders, but he obtained a new judgment on August 1, 1933, which was subsequently affirmed by the Supreme Court of Nebraska in 1935. On

April 19, 1934, execution issued on this judgment, and a portion of the personal property of Motor Works (machinery, furniture, and inventory) was sold by the sheriff in satisfaction on May 16, 1934, for a total price of \$16,248.65. A negligible part was sold to outside parties for cash, but the bulk was sold to Ammon and bidders acting for him. Ammon paid about \$600 in cash, part of which was used to cover the expenses of the sale. The balance was applied on the judgment, and the balance of the purchase price was paid by cancelling the judgment. Prior to the sale Ammon had told several stockholders and directors of Motor Works that the assets purchased by him would be available for any reorganization of the business that might be worked out. (R. 28, 31-32.) Apparently, Ammon transferred these assets to The Cushman Corporation, newly formed by him to hold them (R. 6-7, 33-34).

Shortly after the execution sale Ammon circulated a new reorganization proposal among the Motor Works shareholders. A new company was to acquire the assets of Motor Works and Cushman Corporation. It would exchange one share of its own stock for each share of Motor Works preferred, and one share of its own stock for each 20 shares of Motor Works common. On June 6, 1934, a notice was mailed to the stockholders of Motor Works concerning a meeting to be held June 15 to consider a plan for the organization of a cor-

poration to continue the business of Motor Works. At the meeting the secretary announced the sale of all of the personal property of Motor Works to satisfy Ammon's judgment and Ammon stated that he had acquired the property for reorganization purposes and not for his personal benefit. The new reorganization proposal was authorized by a vote of 5,817 to 151. The new plan did not involve either Easy Manufacturing Company or McGrew Machine Company. (R. 32-33.)

Taxpayer corporation was formed August 21, 1934. On August 22 a contract was executed designating the taxpayer as party of the first part, The Cushman Corporation as party of the second part, and "Cushman Motor Works, a dissolved corporation" as party of the third part. The contract was signed in behalf of the Motor Works by the directors as trustees. (R. 33-34.) The agreement provided for the transfer of all of Motor Works' assets to the taxpayer, and the taxpayer's assumption of Motor Works' debts aggregating \$8,846.46. For each preferred share of Motor Works, taxpayer agreed to give one \$10 par share of its own, plus rights to buy two more shares at \$10 each before October 1, 1934. Taxpayer also agreed to repurchase its own stock on demand for \$7.50 in 1934; \$8 in 1935, and increasing amounts ending with \$10 in 1937. Stockholders preferring cash were offered \$7.50 for each share of preferred stock. In addition, taxpayer gave one of its shares

for each 20 shares of Motor Works common offered (though this was not mentioned in the agreement). Over 80 per cent of the Motor Works' shareholders participated in the plan. (R. 33-37.)

The agreement further provided that The Cushman Corporation would turn over its assets (which were recited to have been acquired for the benefit of the preferred shareholders of Motor Works and for reorganization purposes) for 100 shares of taxpayer's stock. Eighty-eight percent represented the 88 shares of preferred forming the basis for Ammon's judgment, and the balance represented reimbursement for the expenses incurred by Ammon in connection with the suit and sale. The shares were issued directly to Ammon or his order. In addition, Ammon applied the indebtedness held by him against Motor Works toward the purchases of additional stock of the taxpayer at the actual cost to him of the accounts so used. (R. 4, 36-37.)

Neither Ammon nor Cushman Corporation had ever taken possession of the assets purchased by him. Motor Works never ceased to operate. Its business continued without interruption following its dissolution and until the formation of taxpayer to take it over. (R. 36.)

This case is concerned with the basis to be assigned to the assets purchased by Ammon at the execution sale and turned over to taxpayer through The Cushman Corporation. The Commissioner assigned a basis to them of \$16,146.76, their stipu-

lated value on May 16, 1934, when they were purchased by Ammon. (R. 37.) The taxpayer argued for a continuation of the adjusted basis which Motor Works had in these assets. The Board of Tax Appeals sustained the Commissioner and the Circuit Court of Appeals affirmed (R. 237).

ARGUMENT

The decision below appears to be based on two grounds. The first is that under Nebraska law a dissolved corporation is not authorized to become a party to a reorganization under Section 112 (g) of the Revenue Act. The second is that the dissolution of the Motor Works and Ammon's intervening ownership of the assets were not intermediate procedural steps in a single plan but were transactions separate from the subsequent transfer of these and the remaining assets of Motor Works to the taxpayer. In this latter view of the case, Ammon's application of his judgment in satisfaction of his purchases at the execution sale was a separate taxable transaction, and the basis of the assets in his hands was their market value;¹ accordingly, while we may assume that the taxpayer would be entitled to the basis of the assets in Ammon's

¹ *Helvering v. New President Corp.*, 122 F. 2d 92 (C. C. A. 8th); *Commissioner v. West Production Co.*, 121 F. 2d 9 (C. C. A. 5th), certiorari denied, 314 U. S. 682; *Hadley Falls Trust Co. v. United States*, 110 F. 2d 887 (C. C. A. 1st).

hands (as the Commissioner ruled),² it would not be entitled to a carry-over of Motor Works' basis.

The taxpayer has interpreted the decision below as turning solely on the corporate incapacity of Motor Works (Br. 4-5), and contends that the ruling on this point represents an erroneous interpretation of the Nebraska authorities. The possibility is ignored that, even if this interpretation of the opinion should be correct, the decision should be sustained on other grounds.

1. The point upon which the taxpayer seeks review was not advanced by the Commissioner either before the Board of Tax Appeals or before the court below. As we analyze the problem, the question of corporate capacity under state law is immaterial. The issue, for federal tax purposes, is whether the enterprise, as conducted by the trustees, continued to be a "corporation" within the meaning of the federal tax statute. It seems probable that it did. Section 801 (a) (2), Revenue Act of 1934; *cf.* Articles 22 (a)-21 and 801-2, Treasury Regulations 86. Accordingly, any transaction, to which the trustees in fact became parties, would have been a reorganization if it had other-

² This would depend upon the application of Sections 112 (b) (5), 112 (g), 113 (a) (7), and 113 (a) (8) of the Act to the subsequent transactions, which may be questioned. If not applicable, the taxpayer's basis would be lower than that assigned. The point, however, is not essential to the discussion here.

wise complied with the requirements of Section 112 (g) (1).

The point, however, is a novel one, which does not appear previously to have been before the federal courts. And since the decision is properly sustainable on other grounds, we think that there is no occasion for further review of the case.

2. The Board of Tax Appeals, in its opinion, emphasized the separation of the ultimate transfer of the Motor Works assets from all the steps which preceded it (R. 40-41). The court below, as we have indicated, agreed with this analysis of the transaction. That conclusion is correct.

If a plan of reorganization has been proposed and agreed to by the requisite percentage of securities holders of an old corporation, a purchase of the assets at a distress sale by an agent of the participants (for a consideration consisting principally of a cancellation of claims), and a transfer of the assets from the agent to the new corporation, ordinarily may be disregarded as incidental steps in effecting the reorganization transfer from the old to the new corporation. Cf. *Helvering v. Limestone Co.*, 315 U. S. 179. But the ownership acquired by Ammon at the execution sale in the instant case was of an independent character. He was not a mere conduit through which the property passed on its way from Motor Works to taxpayer. His ownership and that of The Cushman Corporation would have been unnecessary as pro-

cedural steps in carrying out an agreed plan of reorganization.

When Ammon bought the Motor Works personal property at the execution sale in May 1934, no reorganization plan was pending. The sequence of events was as follows: In 1932 Ammon began to push a plan for merger of Motor Works, Easy Manufacturing Company, and McGrew Machine Company. Opposition developed, and was strongly expressed at a stockholders' meeting of January 9, 1933. On February 25, 1933, Ammon obtained his first judgment, and on the same day notice was mailed of a stockholders' meeting to consider either reorganization or liquidation. At the meeting, held March 6, 1933, it was determined to liquidate, not to reorganize, and subsequent efforts in that direction were made. These were abandoned in July 1933, for lack of prospective buyers. In May 1933 Ammon's judgment had been set aside at the instance of other stockholders, but he obtained a new judgment in August. Following a levy of execution, Ammon bought in the property levied on in May 1934 and thereafter he began circulating the plan which was finally adopted and carried out, and which did not involve either the Easy or McGrew Companies. (R. 28-37.)

It is apparent that Ammon obtained his judgment and bought in the personal property for the purpose of forcing recalcitrant stockholders to agree to the reorganization which he had in

mind and himself wanted to effect. Ammon virtually admitted this on the stand, and another witness testified that Ammon had expressed such a purpose to him. (R. 83, 128, 151.) In effect Ammon was saying that if the other stockholders would agree to his plan, he would turn the assets over to the new enterprise; if not, he would keep them and they would find a serious depletion of the assets to which they could look for reimbursement of their invested capital. Whereas the record reveals various expressions by Ammon (pp. 34, 75, 99, 163-165) that he bought in the property for the benefit of the Motor Works stockholders and with the idea of effecting a plan of reorganization, the implied threat was there that he had brought them for himself if the reorganization did not materialize. Certainly he had not obtained the judgment or taken over the properties at the execution sale in the capacity of agent or fiduciary for other stockholders, as had the creditors' committee, for example, in *Helvering v. Limestone Co.*, *supra*, and *Palm Springs Corp. v. Commissioner*, 315 U. S. 185. In these circumstances, Ammon's ownership was the sort of independent ownership intervening between that of the old corporation and that of the new which frequently has been held to prevent a finding of reorganization under the tax statutes. *Cf. Bondholders' Committee v. Commissioner*, 315 U. S.

189; *Templeton's Jewelers v. United States*, 126 F. 2d 251 (C. C. A. 6th); *Mascot Stove Co. v. Commissioner*, 120 F. 2d 153 (C. C. A. 6th), certiorari denied, 315 U. S. 802; *Klein Co. v. Commissioner*, 123 F. 2d 871 (C. C. A. 7th), certiorari denied, 315 U. S. 819.

3. The decision below may also be supported even if Ammon's intervening ownership is disregarded. The transaction plainly was not a "statutory merger or consolidation" under Clause A of Section 112 (g) (1), a "recapitalization" under Clause D, or a mere "change in identity, form or place of organization" under Clause E. The purchase rights issued by the taxpayer, its repurchase agreement, and the cash which it paid prevent the acquisition from being one "solely for * * * voting stock" as required by Clause B. *Helvering v. Southwest Corp.*, 315 U. S. 194; see also *Commissioner v. Air Reduction Co., Inc.*, 130 F. 2d 145 (C. C. A. 2d). And there was not established the necessary continuation of stockholder "control" required by Clause C if, as we contended below, only the stock received by the old stockholders *qua* stockholders may be counted.

CONCLUSION

Although the opinion below was based largely on a doubtful ground, the result reached was correct. The case turns chiefly upon its own peculiar facts, and involves no conflict among the circuits.

Accordingly, there is no occasion for further review.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
SAMUEL H. LEVY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

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